IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

MARIANNE MONTLER, Respondent/Cross Appellant,

v.

FIRST AMERICAN PROPERTY AND CASUALTY INSURANCE COMPANY,
Appellant/Cross Respondents

Clark County Case No. 18-2-05942-2
Court of Appeals Case No. 56276-6-II

BRIEF OF RESPONDENT AND CROSS APPELLANT MARIANNE MONTLER
(Corrected)

Calvin P. "Kelly" Vance
WSB 29520
Vance Law Offices
1066 S. Breezy Way
Post Falls, ID 83854
moldlawyer@aol.com
208-262-8115

Attorney for Respondent/Cross Appellant

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

CASES Page(s)

STATUTES

WASHINGTON ADMINISTRATIVE CODES

COURT RULES

TREATISES

I. INTRODUCTION

Plaintiff seeks review of the trial court Judgment and Amended Judgment which denied Plaintiff damages that she had recovered in a first party insurance Mold Appraisal Award. The Award and a Water Damage Award was filed on September 11, 2019 by the Honorable retired Superior Court Judge Roger Bennett, who served as the Appraisal Panel Umpire.

The claim resulted from an October 17, 2017 toilet overflow in Plaintiff's upstairs bathroom, causing grey water to spread downstairs inside the walls and through the main floor ceiling. Plaintiff promptly reported the damage to Defendant, her homeowner's insurer. Defendant contracted with an insurance adjusting firm, Crawford & Company, to review the loss. To Plaintiff's knowledge no one from First American ever visited the site to inspect the damage first hand.

The independent adjuster, Mr. Peters, determined that the cause of loss was the toilet overflow. He made a number of

status reports to Defendant, all of which identified the cause of loss as a "toilet overflow." Mr. Peters did an estimate and Plaintiff sought a competing estimate from a local contractor which turned out to be for considerably more money. First American refused to pay the bid from the contractor.

Defendant suggested that Plaintiff hire one of Defendant's preferred providers, Belfor USA, but Belfor refused to do the work for the amount of the Crawford estimate. Plaintiff was left with a situation where she could find no contractor willing to take on the work for the amount the insurer was willing to pay. An impasse resulted. Meanwhile, toxic mold was discovered in the wetted areas of the hallway, in the adjacent downstairs wall and under flooring on the main floor. Plaintiff moved her family out of the house for health reasons.

Defendant refused to do an estimate or make an offer on the personal property ("contents") part of the claim, and the amount it had paid on the dwelling did not include the cost of

mold remediation. When First American refused to pay further, Plaintiff asserted her rights to an appraisal of the amount of loss. The right to demand appraisal is given in the policy appraisal clause, which reads:

> E. Appraisal
>
> "If you and we fail to agree on the amount of loss, **either may demand an appraisal of the loss. In this event each party will choose a competent and impartial appraiser within 20 days** after receiving a written request from the other. The two appraisers will choose an umpire. If they cannot agree upon an umpire within 15 days, you or we may request that the choice be made by a judge of a court of record in the state where the "residence premises" is located. The appraisers will separately set the amount of loss. **If the appraisers submit a written report of an agreement to us, the amount agreed upon will be the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will set the amount of loss**." (Emphasis added).

CP Ex 6, at p. 17.

Plaintiff hired Adam Blagg, a licensed public insurance adjuster, to be her appraiser. Defendant refused to submit to appraisal, requiring Plaintiff to file suit and then a Motion to Compel Appraisal in order to enforce the appraisal provision.

The insurer had initially paid for alternate living quarters (ALE) once mold was found but later declared that it was going to cut off the ALE benefits. Plaintiff included a Motion for Partial Summary Judgment seeking to extend the ALE benefits with her Motion to Compel Appraisal. Defendant filed an Opposition to both Plaintiff's Motion to Compel Appraisal and Motion for Partial Summary Judgment.

At oral argument on June 7, 2019, Judge Bernard Veljacic heard from both sides on both motions. The insurer tried to justify cutting off ALE benefits by arguing that it found no mold in the house. Plaintiff submitted her environmental expert report confirming the presence of several toxin producing molds in the area where the October 2017 water damage and water stains from the toilet overflow were found.

Judge Veljacic reviewed the record and issued the following ruling:

> " I'm going to rule.
> So **I'm going to order that benefits continue, because there appears to be at this point a**

> **material breach with regard to the appraisal provision** and I can't in good conscience let what appears to be **dilatory behavior on the part of FA then benefit FA in terms of being able to cut off benefits to Ms. Montler. That would be unconscionable.**" (Emphasis added).

RP June 7, 2019 hearing at p. 39. Despite the ruling, Defendant later tried to cut off these ALE benefits. CP Ex. 18. [1]

Judge Veljacic appointed retired Superior Court Judge Roger Bennett to preside over the appraisal proceedings as

---

[1] In preparing this brief, counsel realized Defendant failed to include exhibit 18 as well as other favorable Plaintiff exhibits, in its Designation of the Record. Exhibit 18 was a September 19, 2019 email exchange with Amy Kuhlman from the housing authority after Defendant tried to cut of ALE just two months after the judge's ruling. When asked who told her to violate the court's order, Ms. Kuhlman replied: "We received our instructions from First American." Defendant obviously did not want this exhibit included in the record, although it was admitted in evidence at trial.

Umpire. Judge Bennett and the appraisers focused only on the damage from the October 17, 2017 toilet overflow and the subsequent awards stated October 17, 2017 as the date of loss and gave the claim number for that claim. CP Ex. 10.

Adam Blagg, Plaintiff's appraiser, had worked with Mr. Howson, on many appraisals in the past. Blagg testified that their approach to appraisal is for Blagg to prepare a preliminary estimate, including all possible damage, and the two then work together to remove errors, duplications and damage that may be unrelated to the claim being appraised. RP p. 645/line 16 – p. 646/line 7. Blagg testified that the two followed this approach in this claim as well. RP p. 621/line 5- 624, line 20.

The appraisal panel arrived at unanimous valuations for the loss, issuing separate awards for the water and mold damage and including both dwelling and contents losses. CP Ex. 10. The appraisal clause states that an agreed appraisal award will establish the amount of loss. These awards were unanimous.

Defendant's policy has a Loss Payment provision, under which the insurer is obligated to pay an appraisal award within 30 days. CP Ex 6, p. 18. The evidence showed at trial that Defendant was well aware of its duty to pay the claim after appraisal. In an email to FA's appraiser, Mr. Howson, (CP Ex. 264, p. 2) Mr. May admits:

> **"<u>Appraisal decides how much First American owes to the Montlers.</u>**
>
> You might want to remind Mr. Blagg that the "Loss Payment" clause states that **the amount of loss is determined in one of three ways**: 1) agreement,2) judgment or 3) **appraisal."** (Emphasis added).[2]

The Loss Payment clause to which Mr. May was referring states:

I. Loss Payment

> "We will adjust all losses with you. **We will pay you** unless some other person is named in the policy or is legally entitled to receive payment.
>
> **Loss will be payable 30 days after** we receive your proof of loss and:

[2] This statement was in evidence at trial as an admission.

1. **Reach an agreement with you**;
2. There is an entry of a final judgment; or
3. **There is a filing of an appraisal award with us**."

CP Ex 6, p. 18 (Emphasis added)

Plaintiff gave Defendant time to pay the awards, and when Defendant refused to do so, Plaintiff filed a Motion to Confirm the Appraisal Awards. Judge Veljacic confirmed both Appraisal Awards at a hearing on May 8, 2020. He made his decision on the record, rather than signing a written order. When he was later elevated to the Court of Appeals, the new judge assigned to this case, Emily Sheldrick, ignored May's admission. She also refused to respect Judge Veljacic's June 7, 2019 findings that First American was dilatory and in material breach of contract for failing to submit to appraisal. Judge Sheldrick also disregarded Judge Veljacic's decision confirming the Appraisal Awards and particularly the Mold Appraisal Award. She denied Plaintiff the relief awarded in the Mold Appraisal Award and then denied Plaintiff's petition for attorney fees because she said Plaintiff did not prevail in the

case. In so doing, the trial judge distorted the testimony of trial witnesses, Adam Blagg and Jason Kester, as well as admissions made by Defendant's counsel and Crawford adjuster, Mr. Peters. She also overlooked that Plaintiff had prevailed on enforcing the Loss of Use provision at summary judgment and had forced Defendant to pay ALE benefits of around $ 150,000 before trial even started. She amended her findings and awarded Plaintiff partial attorney fees on reconsideration.

Plaintiff seeks reversal of the trial judge's decision to deny enforcement of the Mold Appraisal Award and a remand with instructions to enter judgment for Plaintiff for the Mold Appraisal Award and for her attorney fees and costs.

Defendant launched a preemptive strike in appealing Judge Veljacic's June 7, 2019 findings that Defendant had committed a material breach of the appraisal provision by refusing to submit to appraisal and by delaying appraisal and Judge Veljacic's findings in confirming the Appraisal Awards on May 8, 2020. Defendant was allowed to amend its Answer

shortly before trial to include a purported fraud defense, which Defendant failed to prove at trial. Defendant asserts error for the trial court's denial of the defense after trial.

Defendant also sought the whole of its $ 193,000 attorney fee bill as a sanction by accusing Plaintiff's counsel of a CR 11 violation. Judge Sheldrick found no CR 11 violation and denied the defense's request for what would likely have been a world record CR 11 sanction.

II. ASSIGNMENTS OF ERROR [3]

1. The court erred in its August 30, 2021 Findings of Fact and Conclusions of Law in opining that the mold found in the home in the spring of 2018 was not attributable to the October 17,

---

[3] Some assignments listed in the Notices of Appeal (items 2-3, 6-7, 11 and 20) raise similar points, and are combined in Assignments 1-4 above. NOA items 8, 9, 12 -14 are combined in Assignments 5 -7 above. NOA items 17 and 18 are combined in Assignments 8 and 9.

2017 water loss event.

2. The court erred in its finding in paragraphs 26 that Mr. Blagg and the appraisal panel, did not consider causation for the mold damage discovered after the 2017 toilet overflow, when 1) both Appraisal Awards stated on their face that they reached an agreed amount of loss for the loss dated October 17, 2019; 2) referred to the claim number for that loss; and 3) Mr. Blagg testified that the panel eliminated damage from other causes.
3. The court erred in saying in its Amended Findings of Fact that Kester did not address causation for the mold when Kester actually testified that the mold appeared where water was present from the October 17, 2017 toilet overflow.
4. The court erred as a matter of law in failing to apply the "efficient proximate cause rule" adopted in Washington.
5. The court erred as a matter of law in refusing to respect the decisions of Umpire Judge Bennett (and appraisal panel) in handing down two binding, unanimous and conclusive appraisal awards, and refusing to respect the decision of Judge

Valjacic in confirming the Appraisal Awards.

6. The court erred as a matter of law in Conclusion of law A1, by refusing to respect Judge Veljacic's June 7, 2019 findings that First American materially breached the policy by refusing to submit to appraisal and was dilatory in delaying appraisal and in making contrary conclusions of law B4 and Supplemental Conclusions of Law 3, that First American did not seek to delay appraisal, did not breach the Policy and paid full compensation to restore the house and replace damaged contents.[4]
7. The court erred as a matter of law in Conclusion of Law B6 that First American is not responsible to pay the Mold Appraisal Award, refusing to follow established Washington appellate case law that appraisal awards are binding and enforceable.
8. The trial court erred as a matter of law in refusing to follow the mandatory rule of RCW 48.30.015(3) stating that a trial court **shall** award attorney fees when a finding of an IFCA violation has occurred (as found by Judge Veljacic on June 7, 2019 and

[4] The insurer paid nothing on the contents claim.

May 8, 2020).

9. The trial court erred as a matter of law in awarding only partial attorney fees and refusing to award full attorney fees warranted under the mandatory rule of *Olympic Steamship*.

III. RESPONSE TO APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court did not err in ruling that First American breached the insurance policy by refusing to submit to appraisal.
2. The trial court did not err in awarding Plaintiff attorney fees, after acknowledging that Plaintiff had prevailed on her motion to compel appraisal and motion for partial summary judgment extending ALE benefits. [5]
3. The trial court did not err in denying First American's fraud defense after trial.
4. The trial court did not err in denying First American's motion for attorney fees as a CR 11 sanction. The trial

[5] Plaintiff's cross appeal asserts that the trial court should have awarded additional attorney fees.

court had found no CR 11 violation by Plaintiff's counsel.

IV. ISSUES PRESENTED FOR REVIEW.

1. May a trial court refuse to enforce an appraisal award that had been unanimously agreed to by both parties and the Appraisal Umpire and confirmed by a previous judge sitting in the case?
2. May a trial court refuse to apply the "efficient proximate cause rule" which holds, as a matter of law, that is a triggering event (water leak) is covered, all ensuing damage is covered?
3. May a trial judge refuse to give legal effect to admissions made by Defendant on dispositive issues?
4. May a trial judge make findings contrary to the evidence presented at trial and contrary to findings made by a judge that heard the evidence on motions before the trial judge was involved in the case?

5. May a trial judge refuse to enforce the mandatory rule that attorney fees shall be awarded under RCW 48.30.015(3) when a trial court has found that the insurer has violated WAC 284.30.330 (7) and (17)?

V. STATEMENT OF THE CASE

This is a first party insurance claim arising from an October 17, 2017 overflow from an upstairs toilet fixture in Plaintiff's residence. The grey water from the toilet overflow traveled downstairs through the upstairs floor and walls and into the main floor hallway, hallway wall and the dining/living room below. Plaintiff discovered the loss when her daughter noticed water dripping from the main floor ceiling. RP p. 275/line 25 – 276/12. Plaintiff promptly reported the damage to Defendant, her homeowner's insurer. Defendant contracted with an independent adjusting firm, Crawford & Company, to review the loss.

Crawford's Mr. Peters made a number of status reports to Defendant, all of which identified the cause of loss as a "toilet

overflow." CP Ex. 111, 112, 113, 127, 146, and 149. FA also stated the cause of loss as "Water leak in the bathroom." Ex. 26.

The wetted building materials later resulted in the growth of toxic mold in Plaintiff's main floor hallway and inside the downstairs walls adjacent to the hallway. CP Ex. 5 and Ex.19, pp. 5-7.[6] This area was directly beneath the upstairs bathroom. RP p. 363/line 23- page 364/line 5 and RP p. 624/line 25 to p. 625/lines 3-20.

Defendant ignored a higher bid from an independent contractor and suggested that Plaintiff hire one of Defendant's preferred providers, Belfor USA. Belfor refused to do the work for the amount of the Crawford estimate. RP p. 300/line 9-10, p. 301/line 20-22.

Defendant refused to pay to remediate the mold. Plaintiff was left with a situation where she could find no contractor willing to take on the work for the amount the insurer was willing to pay. An impasse resulted. Plaintiff engaged an

[6] Exhibit 19 has better photos.

environmental expert to evaluate the house and contents to see if they were indeed contaminated. The environmental report described mold contamination where water from the toilet overflow went into the main floor. CP Ex. 5 and Ex. 19.

When First American refused to pay further, Plaintiff demanded an appraisal of the amount of loss. CP Ex. 4. Plaintiff hired Adam Blagg, a licensed public insurance adjuster and experienced insurance appraiser, to serve as her appraiser. Defendant refused to submit to appraisal, even though, under the appraisal clause, submission is mandatory. CP Ex. 6, p. 17.

The insurer had initially paid for alternative quarters for the Montlers under the Loss of Use or additional living expenses ("ALE") coverage. When Defendant declared that it was cutting off the ALE benefits, this required Plaintiff to file suit to assert her rights under the policy. CP Complaint (7/23/2018) and Amended Complaint (10/11/2018), and to file a Motion to Compel Appraisal and for Partial Summary

Judgment (CP 2/20/2019). Defendant opposed both motions. (CP 3/4/2019).

On June 7, 2019, Judge Veljacic heard oral argument on both motions. During argument, in an effort to justify termination of ALE, defense counsel told Judge Veljacic that the insurer's hygienist found no mold in the house.

Mr. May: "Yes. Mr. Vance is incorrect. We did hire an industrial hygienist who went out – from Rimkus, who inspected the loss on May 8, 2018. And the Rimkus industrial hygienist found – it [sic] did mold testing and found no mold within the house."

RP June 7, 2019 hearing at pp. 31-32. Fortunately, Plaintiff had placed in evidence the report of her own industrial hygienist, Jason Kester. CP Ex. 5 and 19. The report stated on page 4:

> "The dining room floor **and wall shows signs of microbial growth**, water damage, water stains, and deterioration. **One of the walls in the dining room area is the wall opposite of the half bath under the stairwell**. A sample was collected from the wall and was sent to Hayes Microbial for analysis. The results show positive for **Chaetomium and Stachybotrys** with "Very Heavy/Light" spore estimate and "Many/ND" mycelial estimate." (Emphasis added).

After hearing from both sides and considering the health of Ms. Montler and her children, Judge Veljacic made specific findings that the insurer had materially breached the contract by refusing to submit to appraisal, had been dilatory in delaying appraisal and was trying to capitalize on its own dilatoriness by cutting off ALE benefits while the house remained unrepaired. Judge Veljacic stated:

> " I'm going to rule. So I'm going to order that benefits continue, because **there appears to be at this point a material breach with regard to the appraisal provision** and I can't in good conscience let what appears to be **dilatory behavior on the part of FA then benefit FA in terms of being able to cut off benefits to Ms. Montler. That would be unconscionable**."

RP Hearing on June 7, 2019 at page 39.

Judge Veljacic extended the Additional Living Expenses ("ALE") for a substitute rental until the house was repaired.[7] Judge Veljacic appointed retired Superior Court Judge Roger

---

[7] Defendant later tried to cut off these benefits. Ex 18.

Bennett to preside over the appraisal proceedings as Umpire. By this time, Defendant had appointed an appraiser, Roger Howson.

Adam Blagg, Plaintiff's appraiser, had worked with Mr. Howson, on many appraisals in the past. Blagg testified that their approach to an appraisal is for Blagg to prepare a preliminary estimate, including all possible damage, and the two would then work together to remove errors, duplications and damage that is unrelated to the claim being appraised. RP p. 645/line 16 – p. 646/line 7. Blagg testified that the two used this approach in this claim as well. RP p. 621/line 5- 624, line 20. [8] The result was that the appraisal panel arrived at an **agreed and**

---

[8] Despite Blagg's testimony that his initial estimate is only a preliminary worksheet, which Howson acknowledged, the trial judge criticized Blagg for having submitted an estimate that was higher than the final awards. Blagg testified that this give and take is how appraisal is done.

unanimous valuation for the October 17, 2017 water damage and mold damage. CP Ex. 10. The appraisal awards made clear that they addressed only the damage from the October 17, 2017 toilet overflow. *Id.* The awards included the 2017 claim number and date of loss for the October 17, 2017 event. *Id*. Judge Bennett filed the appraisal awards with the Superior Court. *Id*.

First American's policy has a Loss Payment provision, under which the insurer is obligated to pay an appraisal award within 30 days. In an email to Defendant's appraiser, Mr. Howson, CP Ex. 264, p. 2, defense counsel admitted:

> "**Appraisal decides how much First American owes to the Montlers.** You might want to remind Mr. Blagg that the "Loss Payment" clause states that the amount of loss is determined in one of three ways: 1) agreement, 2) judgment or 3) **appraisal."** (Emphasis added)."

Plaintiff argued below that his statement was an admission showing that Defendant knew it was obligated to pay the appraisal awards. The trial judge disregarded the admission.

The Loss Payment clause to which Mr. May was referring states:

> "We will adjust all losses with you. We will pay you unless some other person is named in the policy or is legally entitled to receive payment. **Loss will be payable 30 days after** we receive your proof of loss and:
>
> 1. **Reach an agreement with you**;
> 2. There is an entry of a final judgment; or
> 3. **There is a filing of an appraisal award with us**."

CP Ex 6, p. 18. (Emphasis added)

Judge Veljacic confirmed the appraisal awards in a hearing on May 8, 2020. Judge Veljacic also made the finding, once again, that Defendant had been dilatory throughout the case and had refused to submit to the appraisal process mandated in the policy. Judge Veljacic stated on the record:

> **"There has been delay throughout this case on the part of First American – significant delay which, on a case where there's essentially admitted liability**, it's – I don't know that that's exactly precise, **but there's agreed coverage and a contractual provision regarding mandatory appraisal**, which is in First American's contract, which they drafted. **And a refusal to engage in that.** And so I am mindful of those issues, and I'm considering those. . . ." (Empasis added).

RP p. 77/Line 1 – p. 78/line 23.

Judge Veljacic then confirmed the Awards and set the damages as awarded in them. He even stated the amounts he was confirming. Judge Veljacic continued:

> "**Today, I don't think it's out of line for me to confirm those appraisal awards.** Those are filed September 12, 2019.**They're entitled "Agreed Appraisal of Loss."** They're performed by our umpire, retired judge – Superior Court Judge Roger Bennett, appointed by this Court. **They list the dwelling replacement cost value at – well, they speak for themselves. $128,742.70. And replacement of the contents, 68,232.17. And the permits and fees, $1,500. And so those are the values. I'm confirming that that's been completed – that those values are agreed**…. And so I believe I'm on firm ground in confirming that those are the values. **So that document speaks for itself. I'm confirming it today.** I'll entertain an order to that effect…. I've ordered it. It was done. I'm confirming that work." (Emphasis added).

RP p. 77/Line 1 – p. 78/line 23.

Judge Veljacic was elevated to the Court of Appeals and replaced on the case by a new judge, Emily Sheldrick. The new trial judge refused to respect Judge Veljacic's findings and legal rulings on both June 7, 2019 and May 8, 2020. As shown below, the trial judge also ignored the admissions in the Crawford adjuster's reports that the toilet overflow was the cause of damage and mischaracterized the testimony of Mr.

Blagg and Mr. Kester. Against all evidence to the contrary, the trial judge made a finding that the toilet overflow did not cause the mold growth on the floor beneath the upstairs bathroom, despite there being no other source of water necessary for mold to grow. CP (Findings of Fact, Conclusions of Law and Orders dtd 8/30/2021).

The trial court's findings were not supported by substantial evidence. Indeed, they directly contradicted the actual testimony given at trial. The trial court also refused to acknowledge or apply the "efficient proximate cause rule" which states that when the triggering event causing the chain of events is covered, all other damage resulting from the triggering cause is also covered. The trial court ignored Defendant's admissions on pages 2 and 3 of his trial brief that the 2015 water loss was "unrelated" to the October 2017 toilet overflow and that this case only involved the 2017 water loss. CP (3/1/2021 and 7/26/2021. (Defendant states an incorrect date in its Designation for the latter).

Despite having a unanimous Mold Appraisal Award, which had been confirmed by Judge Veljacic, the trial judge denied Ms. Montler a judgment that should have resulted from the confirmation of the appraisal awards, particularly the Mold Appraisal Award. The trial court then held that, because Plaintiff had not won a money judgment (solely because the judge refused to enforce the Mold Appraisal Award), Ms. Montler was not a prevailing party entitled to an attorney fee award. The trial judge disregarded the fact that Plaintiff had recovered thousands of dollars in ALE benefits from the motion Judge Veljacic granted in June 2019. CP Order dated 6/18/2019.

Plaintiff moved for reconsideration (CP motion dated 1/21/2022) and for a new trial, citing, *inter alia*, that, at a minimum the ALE recovery made Plaintiff a prevailing party even before trial and she was, therefore, at least entitled to attorney fees under the *Olympic Steamship* doctrine. The trial court then reconsidered and amended the decision to

acknowledge this recovery but awarded only those attorney fees that the court deemed incurred in the motion to extend ALE and no other fees. CP Amended decision dated 2/8/2022. This Cross Appeal followed.

Despite the fact that the Mold Appraisal Award was agreed to by both Plaintiff's and Defendant's appraisers and that the Loss Payment clause required Defendant to pay in 30 days, Defendant continued to deny payment. Instead, Defendant accused Plaintiff and her counsel of committing fraud, based on a settlement letter sent to a different attorney involving different damages from a different event in a different case, *Montler v Yang*, case no. 18-2-05333-5.

Defendant's scenario for the so-called fraud defense was that the damages claimed in this case were the same damages claimed in the *Yang* case and that Plaintiff and her attorney concealed this supposed fact from First American and its counsel.

The facts at trial showed, however, that the Yang

settlement was based on a **personal injury claim** arising from the Yang's nondisclosure of defects in the residence in 2015, not the property damage claim against the insurer that arose two years later.

A local attorney, Mr. Chris Rounds, was chosen as the Minor Settlement Guardian Ad Litem in the *Yang* case and he issued a report to the court. CP Ex. 15. Mr. Rounds made it clear that the settlement of the *Yang* dispute, arising in 2015, was unrelated to the 2017 claim involved in this case. Mr. Rounds wrote in his SGAL report to the court in the *Yang* case:

> " Unfortunately, a more extensive mold exposure occurred in the fall of 2017. **The present settlement does not include any injuries or expenses arising from the 2017 mold exposure**."

Id. (Emphasis added).

Mr. Turner approved of the SGAL report and was given a copy. In fact, First American's counsel was given a copy as well, which should have ended – then and there -- the false charge that the two cases involved the same damages. Further

proof that the two cases involved different claims for different damages is found in Plaintiffs' June 23, 2019 Response to Defendant's Request for Production, which states on page 1: "Plaintiffs do not seek any damages in this case **that arose prior to the events in October 2017.**"CP Plaintiff's Supplemental Designation of Clerk's papers.

The evidence at trial also showed that the settlement in the *Yang* case resulted not from Plaintiff's demand letter, but from a counteroffer from the Yang's attorney, Mr. Steven Turner, in an email a few months later, which Plaintiff accepted. CP Ex 20. Mr. Turner wrote:

> "Before we launch into depositions and other full blown discovery, my clients have authorized me to make one final settlement offer of $ 120,000.00, to be allocated between the plaintiffs and your fees in whatever manner you see fit. I urge your clients to accept this offer because the defendants in the other lawsuit are going to move to consolidate the two actions. There could be several advantages to settling this suit before the two suits are consolidated."

Defendant's claim that this attorney somehow committed

fraud by not disclosing the settlement demand to Mr. Turner in the *Yang* case also distorted that settlement demand. This attorney tried to make it clear to Mr. Turner that, for the purpose of the demand letter at least, Plaintiff would be seeking compensation for the property damage resulting from the 2017 toilet overflow from First American, not the Yangs. But in the interest of full disclosure counsel informed Mr. Turner that he could not guarantee that the insurer would not seek subrogation if it ever paid the property damage claim.

> "For the purpose of this offer only, **my clients will seek repair costs and contents reimbursement from their insurer,** but this is no guarantee that the insurer will not seek to pursue subrogation rights against the Yangs, once it pays off. The Yangs assume that risk."

CP Ex 172 at p. 3. Plaintiff did not seek the same damages in both cases, but took pains to separate the two claims to avoid confusion. Those efforts would not prevent Belfor from intermingling issues by consolidation in order to blame the Yangs for everything nor would it prevent the insurer from

seeking to recoup its losses by seeking subrogation.

VI. ARGUMENT ON CROSS APPEAL

While many courts view a first party insurance suit as just another adversarial proceeding, first party insurance cases must be evaluated in its proper context. RCW 48.01.030 imposes a duty of good faith on the insurer:

> "The business of insurance is one affected by the public interest, requiring that all persons be actuated by **good faith, abstain from deception, and practice honesty and equity in all insurance matters.** Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance." (Emphasis added).

Washington law also recognizes that an insurer owes its insureds a fiduciary duty beyond mere good faith and fair dealing. Washington Appellate Courts have confirmed this duty in case after case, involving both third party and first party insurance claims. For example, in *Tank v State Farm Fire and Casualty Co.,* 105 Wn 2d 381, 715 P2d 1133 (1986), the court discussed the evolution of the duty of good faith imposed on insurers. The *Tank* court referred to the prior decision in *Tyler*

v. Grange Ins. Ass'n, 3 Wash.App. 167, 173, 473 P.2d 193 (1970), in describing the fiduciary duties owed by an insurer:

> "**This fiduciary relationship**, as the basis of an insurer's duty of good faith, implies more than the "honesty and lawfulness of purpose" which comprises a standard definition of good faith. It **implies "a broad obligation of fair dealing**" …. **and a responsibility to give "equal consideration" to the insured's interests….** Thus, an insurance company's duty of good faith rises to an even higher level than that of honesty and lawfulness of purpose toward its policyholders: an insurer must deal fairly with an insured, **giving equal consideration in all matters to the insured's interests**."

Tank, *supra*, at 385-386, 715 P2d at 1136. (Emphasis added).

Coventry Associates v American States Insurance Company, 136 Wn 2d 269, 281, 961 P2d 933 (1998), discussed the duty more fully in a first party context:

> "In first party situations, the insurer establishes the conditions for making and paying claims. The insurer evaluates the claim, determines coverage, and assesses the monetary value of the coverage. **Thus, the insurance contract brings the insured a certain peace of mind that the insurer will deal with it fairly and justly when a claim is made. Conduct by the insurer which erodes the security purchased by the insured breaches the insurer's duty to act in good faith**. (Emphasis added).

Among the insurer's duties is the duty to complete its investigation of the loss within 30 days. WAC 284-30-370. Not only are insurers obligated to complete their investigation within 30 days, the proverbial reasonable time, they must accurately price the value of a claim. WAC 284-30-380. First American has **never** valued the cost to restore the dwelling to pre-loss condition and has never valued the damaged contents, except when compelled to do so in appraisal. It violated its fiduciary duties to Ms. Montler and her children as well as its duties under the Washington Insurance Code.

1. COMBINED ARGUMENT ON ASSIGNMENT OF ERROR 1 - 4. [9]

A. Standard of Review

Courts in Washington interpret insurance policies as the average person purchasing insurance would, giving the

---

[9] NOA items 2-3, 6-7, 11, 20 and 21 which raise similar points, are combined in Assignment of Error 1-4 above.

language "a fair, reasonable, and sensible construction." *Key Tronic Corp. v. Aetna Fire Underwriters Ins. Co*., 124 Wash.2d 618, 627, 881 P.2d 201 (1994) (quoting *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 126 Wash.2d 50, 65, 882 P.2d 703, 891 P.2d 718 (1994). The interpretation of an insurance policy is reviewed *de novo* for an error of law.

Washington has adopted the "efficient proximate cause rule" which provides that if the event triggering a chain of events is a covered cause of damage, all ensuing damage is also covered as a matter of law, even if it would otherwise be excluded, but for the triggering event. *Pluta v USAA*, 72 Wash.App. 902, 866 P.2d 690 (1994). The trial court's refusal to apply the efficient proximate cause rule is reviewed for an error of law. *Id*.

B. <u>Neither Causation Nor Coverage Were In Dispute</u>

From the beginning of the claim, the Crawford adjuster, Mr. Josh Peters, wrote numerous letters to the insurer, all of which stating that the cause of loss was "Water, Toilet

Overflow." CP Ex 111, 112, 113, 127, 146, and 149. These are admissions that the toilet overflow was the "efficient proximate cause" of the loss.

In addition to the admissions in Defendant's claim file, defense counsel also admitted on page 2 of Defendant's Trial Memorandum that the 2015 water event was "unrelated" to the claim addressed in this case. Defense counsel also admitted on page 3 of the same Trial Memorandum that this lawsuit only involved the 2017 water loss. *Id*. Given these admissions by Mr. Peters and Mr. May, causation was never in serious dispute. During the two or more years that the case was in litigation, Defendant never raised the any causation or coverage issues in a motion to dismiss the claim. On the contrary, Defendant paid on the dwelling water damage part of the claim and also paid extended Loss of Use benefits. That is an admission by conduct that the claim was covered.

While admitting in its trial brief that any prior damage was "unrelated" to the damage at issue in this case, the insurer

still tried to confuse the issue at trial by making much of its presentation about the "unrelated" water leak in the downstairs kitchen and bathroom in 2015. But, as shown below, Mr. Kester's report and his testimony were that the mold and water damage and stains he found in May 2018 were clearly from the recent toilet overflow and not some distant prior event. As shown below, Mr. Blagg also testified that he traced the stains from the upstairs toilet aera down into the hallway where Kester documented the mold. The area where mold was found in May 2018 was **across the hallway** from the downstairs bath, where the 2015 water event had occurred. CP Ex. 5 and 19, p. 4 -7. Kester's report included photos of the hallway ceiling cutaway to address the wetted ceiling drywall. CP Ex. 19.

Mr. Kester and Mr. Blagg investigated the scene at the same site visit. Mr. Blagg testified about his experience and training as a mold inspector.

> A. "I was an EPA lead risk assessor. I was a certified mold inspector – actually, I still am. I was certified by the Institute of Inspection Cleaning Restoration, the IICRC is how they're referred, for applied microbial remediation

> technician. Fire and smoke damage technician and water damage restoration technician."

RP, p. 603/Line 23- p. 604, line 4.

Mr. Blagg described his investigation and how he traced the water stains from the upstairs bathroom to the downstairs hallway and wall cavities.

> Q. "Okay. What did you see? You walk in the door and what did you see?"
>
> A. "There was flooring missing, I went upstairs first, that's where you go, to the scene of the crime, right? I looked at the john, the toilet that had overflowed. **I tracked the water. It was pretty obvious where it went upstairs. You can see staining that leaves – especially when it sits for as long as it did. You can see staining. You can see where it went, ran down to the walls, ceilings, went downstairs, tracked it there**.

RP p. 624/line 25 to p. 625. Mr. Blagg explained how water had migrated downstairs:

> A. "The downstairs, the hardwood had been removed by that point. **You could see where the water ran out of the walls. You could see where the sheetrock was discolored at the bottom and so I put some holes in the walls to look inside and found mold inside the walls as well. That was pretty much my first site visit**. . . . And so I was able to just follow the leader., you know, follow the pathway of the water…."

RP p.625/line 3- 20.

Mr. Blagg also identified how the water from the toilet overflow had managed to get downstairs, inside the walls and

into the kitchen through capillary action under the floor's underlayment:

> Q. The – the pathway of the water spreading, describe that for the Court.
>
> A. Water ran across the tile. The tile didn't soak up much of the water so it ran right into the master bedroom and then because of the way the house tilts, the way it settled, ran out into the hallway, so that all that carpet had been removed. **A little bit went down the stairs. From there, it went down into the hallway downstairs, the foyer, the entryway, whatever you want to call it. A little bit into the kitchen, the dining and the living room** and that little – I think it's a half bath down there.
>
> A. And the capillary action actually worked its way after there to – it's a floating floor. The floating floor set on a little bit of foam, right, this cushion that goes into between the deck and the – or subfloor and the flooring itself and so the water just sat in there apparently until some time in March.
>
> Q. Okay. Describe what you mean by capillary action?
>
> A. So that's water moving not just through gravitational forces. **So when it's trapped in between something, you can get hydraulic pressure. You can get all kinds of different movements by people walking on the floor up above, so it will spread out in a way that wouldn't normally because it's trapped in between two layers of things**."

RP p. 626/line 12 – p. 627/line 15.

Mr. Blagg testified that he found black mold inside the wall cavity downstairs:

Q. "You mentioned you poked a hole in a wall?"

A. "**Yeah. I mean, there was – there was mold found by BELFOR in the crawl space and behind the base. There was mold found by the – whoever the second contractor was – Paul Davis. So I already knew that, right, going in**. **Those two guys had found mold when they were demoing from this scope of work. So I knew mold was going to be the factor."**

Q. And—

A. "I didn't know it was going to be to the extent that I found, because I actually opened up the wall cavity, looked inside. Because my experience, you know, tells me to look two feet past. As a certified mold inspector, you're only supposed to cut out two feet past wherever you find mold just to make sure. Want to err on the side of safety."

RP p. 628/lines 3- 18. Mr. Blagg elaborated on his investigative approach:

A. "**Well, there was staining that I followed so that I could cut the holes in the walls that they were looking at that showed you where the water came from. It came from up,** you know. **It ran down the walls. It obviously wasn't from the 2015 leak**, because they've already admitted there was no mold and water staining. And then that was actually a ground floor. That couldn't have come from up.

Q. "So that distinguishes the two claims in your mind as one was on the ground floor and one was on the upstairs?"

A. "**Well, that – that and you could actually physically follow the staining**. It makes sense, I mean, if you went to the site, which Rick Shima never did, **you can actually see that four large steps away, the water disappears into the walls. You go downstairs and see where the water comes out from the walls**. It's

in everybody's photos."

RP p. 635/line 2- p. 636/line 16. Mr. Blagg's comment that the insurer had "already admitted there was no mold and water staining" found in 2015 was a reference to a report by the insurer's consultant, American Leak Detection in 2015 that there was no mold or water damage found in 2015. CP Ex. 7.

The trial judge incorrectly portrayed Blagg's and Kester's testimony in the August 30, 2021 decision. Mr. Kester had actually testified that there was really no doubt that the mold was growing from a **recent** water event, not something from two years years before.

Q. "Okay. What was your first impression?"

A. "Well, it was pretty easy, because **there was visual and visual evidence of water damage and microbial presence just visible to the naked eye**. It actually didn't take any additional investigative – like, we weren't – the thermal cameras and moisture meetings weren't – I mean, they're always necessary, but they weren't necessary in this case to determine, you know, essentially it was – without being oversimplistic, **it was like, look, there's the mold. You know, it was visible on the drywall that was available for us to see at the time of the assessment.**"

RP p. 324, line 18- page 325, line 4.

Mr. Kester explained that for these molds to grow, there needed to be a very high and **recent** water concentration in the tested area.

> Q. "Okay. Would you please describe what those molds are….?"
>
> A. "Sure, Chaetomium is a mold that is highly toxic. It produces a mycotoxin called Chaetoglobosin. **It is a mold that needs an elevated content of about 95 percent or higher to be actively growing**. It is generally found on impacted drywall and materials that can – like paper materials, **that kind of stuff, that can get very, very wet very, very quick."**
>
> Q. "So you say it needs 95 percent moisture to grow?"
>
> A. "Correct… the extra room for the living room, it says we did find positive for Alternaria and Chaetomium. The Chaetomium was listed as very heavy when it comes to spore estimate and then many – if you – it isn't – sentence there. It talks about the mycelial estimate… So in this case, many is the most that you can get when it comes to mycelial which means that there is a likely – a likely activity at that site **which would mean that it is actively wet and continuing to grow**."

RP p 346, line 20 to p. 348 line21.(Emphasis added).

> Q. "Does Chaetomium appear in a dry substrate or does it need to be very wet as you just indicated?"
>
> A. "It needs to be wet."
>
> Q. **"So currently wet?"**
>
> A. "**Correct**. To create – to have the mycelial numbers that we found in the lab sampling, **it has to be wet currently."**

RP p. 350 lines 6 – 12. (Emphasis added).

> A. "That would indicate that there – with active Chaetomium present, **it would indicate there's an active problem currently."**
>
> A. "**And that the material is actively wet**."

RP p. 353 line 22- page 354 line 9. (Emphasis added). Mr. Kester went on to say that the other mold he found needs an even wetter substrate:

> "Stachy actually needs an elevated moisture content on a given material of 98 percent or higher to grow."

RP p. 355/ lines 1- 5.

Contrary to the trial court's depiction of his testimony, Mr. Kester eliminated any older cause for the mold growth.

> Q. "Okay. So based on your expertise and the 15,000 or so mold inspections that you've done, **is it more likely than not that you found this mold because of a current and active wetting and not from an old water exposure from, say, 2015**?"
>
> A. "So based on the mold sample results from Hayes Microbial, **it indicates an active source."**

RP p. 359/line1 p. 360/line 8. (Emphasis added).

Mr. Kester also testified that he consulted with Mr. Blagg and agreed that the mold resulted from the toilet overflow, which Blagg tracked into the downstairs area where mold was

found. RP p 360/ line 9- p. 361/line 3. Kester also agreed with Mr. Blagg's finding of the water spreading by capillary action.

A. "I observed that there was a water event from upstairs. We observed – I observed water damage to the drywall and the materials below it, and I observed water that would have been flowing underneath the flooring to get to the area in the kitchen that would have been through capillary methods to get to as well so we were able to see—sorry—I was able to see and determined based on my findings how that cause analysis was looking at like what caused this issue."

Q. "So would you explain to the Court what you mean by capillary action?"

A. "Basically, it's – it's when water or some other liquid material is kind of forced through small channels, capillaries from one location to another."

Q. "Okay. So you're talking about water where?"

A. "Under the floor. Yeah, so it would have been between the subflooring and the flooring and that movement – if water doesn't have somewhere else to go, if it can't escape, you know, gravity wise, it has to pool. But when it pools and then it gets moved through just through, you know, active leaking and those kinds of things, you can end up with water spreading, you know, based on the fact that – unless water dries, if it's active between the flooring and the subfloor, it doesn't have gravitational dynamic to go downward, it will just continue to flow outward."

Q. "So would walking on a laminate flooring, for example, sort of aggravate or increase the capillary action?"

A. "It would. Basically, it would be the same as walking on a waterbed. You walk on the waterbed, you displace the water that's under it."

Q. "Okay. Does that explain why there would be water that migrated to other parts of the main floor that …?"

A. Yeah. It was my understanding from me for that day that that's what would have caused the microbial presence within the kitchen area."

RP p. 363/line 23- page 364/line 5. On cross examination, Mr. Kester was asked by defense counsel to confirm that mold needs moisture to grow.

Mr. May: "Would you agree with me that mold needs three things to grow: Number one, Moisture; number two, some sort of organic food; number three, mold spores?"

A. "Correct. Yes."

RP p. 366, lines 5- 8.

The trial judge questioned Mr. Kester about why he tested for mold downstairs below the upstairs bathroom instead of upstairs. Kester explained that water runs downstairs and then pools up, so that is where to test:

Q. "And when you returned to the house in 2018, and you testified that you took swab samples, is there any particular reason, if you recall, for why you didn't do swab samples in the entryway or the upstairs bathroom or upstairs bedroom attached to the bathroom?"

A. "Yes, absolutely. I mean, water goes downward. Water and gravity, you know, they're always together, so you can have a water event in an upstairs of a building that does not directly translate to microbial presence in that general location. **You will find mold always at the lowest point where water will pool, which if you have a toilet that leaks or a sink that leaks, water will go downward. It doesn't mean that you're going to find microbial presence on that toilet. It means you're going to find microbial presence below that toilet."**

RP p. 378/line 17- page 379/line 6. (Emphasis added).

Obviously, Mr. Kester and Mr. Blagg testified differently than the way the trial court described in her decision. Not only did Mr. Kester's and Mr. Blagg's clear and unequivocal testimony not provide "substantial evidence" to support the judge's decision, but the court's findings were the opposite of their actual testimony. After wrongly depicting the Blagg and Kester testimony, the trial judge then used this inaccurate depiction as a basis to refuse to enforce the Mold Appraisal Award. This was legal error, and it was prejudicial.

Even Defendant's witness, Mr. Peters, grudgingly admitted at trial that the damage in the downstairs bathroom from 2015 was "unrelated. He testified at trial that he reported

the water damage in the main floor hallway as “new damage.” RP p. 824 line 10- page 825 line 24.

The trial judge’s “findings” that the toilet overflow did not cause the mold was contrary to the admissions by Defendant’s counsel as well as the mold report, and the testimony of Mr. Blagg, Mr. Kester, and Mr. Peters on the issue. The trial judge was clearly mistaken in her findings. Not only were her findings not supported by “substantial evidence” but they were flatly contradicted by the actual testimony at trial and admissions made by Defendant’s witness and attorney.

While trying to confuse the court on the possibility that causation or coverage was still in dispute, Defendant’s only coverage denial was for the malfunctioning toilet itself. CP Ex. 108. In over two years of litigation, Defendant did not move to dismiss claiming the claim was not covered. On the cpontrary, Defendant paid on the dwelling and Loss of Use coverages. Moreover, at trial Defendant did not even include the policy as one of its exhibits or call any First American claims personnel

as a witness to testify about any supposed "coverage issue." The coverage "issue" was simply a ruse to delay payment.

The trial court's finding that the appraisal panel did not address causation for the damage from the toilet overflow is also not supported by substantial evidence. Both appraisal awards made it clear that the appraisal panel only appraised the October 2017 claim. The panel placed the date of loss (October 17, 2017) and the claim number for the toilet overflow claim on the face of both appraisal awards. CP Ex. 10.

Plaintiff's counsel pointed out First American's admissions to the trial judge in his closing argument. CP (Written Closing Argument dtd 8/13/2021). Despite this, the trial judge disregarded the admissions. Plaintiff's counsel had also pointed out in his trial brief and closing that under the "efficient proximate cause rule" all damage was to be considered the result of the triggering event – the toilet overflow. *Id*. The trial judge refused to apply the efficient proximate cause rule, defying mandatory Washington

precedents.

As a matter of law, a trial judge is obligated to enforce an Appraisal Award by entering judgment when an insurer fails to pay. As the court said in *Keesling v. Western Firs Ins. Co. of Fort Scott, Kansas,* 10 Wn App 841, 845, 520 P2d 622 (1974):

> "[I]f the company does not pay the damages fixed by the appraisers, an insured must commence legal action, **the appraisal must be confirmed by the court and judgment entered for the insured.**" (Emphasis added).

Judge Veljacic noted in his ruling on May 8, 2020 that coverage was acknowledged. He was correct. First American had paid on the claim. It did not deny coverage or bring a coverage motion. And Judge Veljacic was right for a different reason, coverage was never in doubt. This is an "all risk" or "open perils" policy, which means that coverage is presumed for any direct loss to property, unless specifically excluded by a policy exclusion. *CH Leavell & Co. v. Fireman's Fund Insurance Co.*, 372 F.2d 784 (9th Cir. 1967). *See also Busch v. Ranger Ins. Co.,* 46 Or. App 17, 610 P2d 304, 306 fn. 4 (1980).

Here, the loss falls squarely within the scope of insured perils. The policy covers damage to the dwelling under Coverage A and personal property if it suffers physical loss by an "Accidental Discharge Or Overflow of Water or Steam ….. from a plumbing … system." CP Ex 6, p. 12. That is exactly what happened on October 17, 2017.

An insurer has the burden to show that a loss is excluded. *CH Leavell, supra.* Defendant offered no exclusions in evidence at either appraisal motion hearing or at trial. On the contrary, Defendant did even make the policy an exhibit at trial. Thus, Judge Veljacic was correct in saying that coverage was agreed since defense counsel failed to provide evidence of any specific exclusion at any point of the case, including trial.

Even if Defendant had offered evidence of an exclusion, Washington has adopted the "efficient proximate cause rule" which negates certain exclusions. In *Starczewski v Unigard Insurance Group*, 61 Wn App 267, 810 P2d 58 (1981) Plaintiff's duplex had caught fire on February 26, 1982 and

much of the building was destroyed. The claim went unresolved until, in June of 1984, the trial court granted a motion to submit the fire loss to appraisal. Importantly, the court also issued a decision that the insurer's exclusion was rendered ineffective by the "efficient proximate cause" rule. *Id*. at 273-275:

> "Under the facts of this case, **Unigard's exclusion would also be rendered ineffective by the "efficient proximate cause" rule**, since any additional repair costs due to code requirements resulted predominately from the fire, not from the enforcement of any ordinance or law. *See* ***Safeco Ins. Co. v. Hirschmann***, 112 Wash.2d 621, 773 P.2d 413 (1989)."

Defendant believed that it could confuse the trial court by merely saying there was a causation or coverage dispute, without offering any actual evidence of one. It had tried that tactic with Judge Veljacic but Judge Veljacic saw through the dilatoriness and ordered Defendant to appraisal and later confirmed the Appraisal Awards. The trial judge simply refused to respect Judge Veljacic's prior rulings and refused to enforce the Mold Appraisal Award, in direct defiance of the rule

announced in *Keesling*. [10]

D. The Trial Court Committed Legal Error in Failing to Apply the "Efficient Proximate Cause Rule" on Coverage and Causation.

The trial court committed legal error by ignoring the "efficient proximate cause rule" cited by Plaintiff's counsel in his trial memorandum (CP dtd 8/2/2021) and Closing (CP dtd 8/13/2021. The rule provides that if the event triggering a chain of events is a covered cause of damage, all ensuing damage is also covered, even if it would otherwise be excluded, but for the triggering event. For example, in *Pluta v USAA*, 72 Wash.App. 902, 866 P.2d 690 (1994) heavy rains caused land flows on the policyholder's property. The insurer tried to use an exclusion

---

[10] The trial court tried to say that Judge Veljacic was reserving the causation issue for trial. But Judge Veljacic's comments on May 8, 2020 indicated, instead, that he was reserving the issue of whether to impose statutory damages under RCW 48.30.015(2) and for how much.

for earth movement to avoid responsibility, but the court held that the exclusion was overridden by the efficient proximate cause doctrine. The court explained the rule and then held that policy language changes the insurer enacted to limit liability do not prevail over the rule. The *Pluta* court said:

> "The Supreme Court of Washington has developed a rule of insurance coverage denominated as the "efficient proximate cause" rule. The rule evolved in a series of cases beginning with *Graham v. Public Employees Mut. Ins. Co.*, 98 Wash.2d 533, 656 P.2d 1077 (1983). The *Graham* court stated:
>
> > 'Where a peril specifically insured against sets other causes in motion which, in an unbroken sequence and connection between the act and final loss, produce the result for which recovery is sought, the insured peril is regarded as the "proximate cause" of the entire loss. **It is the efficient or predominant cause which sets into motion the chain of events producing the loss which is regarded as the proximate cause, not necessarily the last act in a chain of events**." (Citations omitted.) *Graham*, 98 Wash.2d at 538, 656 P.2d 1077.'"
> >
> > **Thus, when the "efficient proximate cause" of a loss is an event which is expressly covered by the insurance policy, the insured is entitled to benefits, even if there are subsequent events which are specifically excluded from coverage**. *See also Safeco Ins. Co. of Am. v. Hirschmann*, 112 Wash.2d at 628, 773 P.2d 413; *Villella v. Public Employees Mut. Ins. Co.*, 106 Wash.2d 806, 815, 725 P.2d 957 (1986)." (Emphasis added).

The court then noted that after the *Graham* decision, insurers began trying to write language changes into their policies to try to circumvent the rule. The *Starczewski v Unigard Insurance* court explained that such policy exclusions were unenforceable if they violated the efficient proximate cause rule:

> "**After *Graham*, some insurers attempted to circumvent the "efficient proximate cause" rule by rewording their policies**. In particular, these insurers added to the exclusionary sections of the policies. In *Villella*, 106 Wash.2d at 817–18, 725 P.2d 957, **the Supreme Court held that an exclusion for losses contributed to or aggravated by earth movement could not defeat recovery when the "efficient proximate cause" of any loss was a covered event**, there the negligent installation of a drainage system. (Emphasis added).

Washington courts have rejected the kind of approach First American has taken with this claim in *Pluta*, in *Hirschmann* and in *Villella.* The toilet overflow is a covered event and the efficient proximate cause rule takes it from there.

2. COMBINED ARGUMENT ON ASSIGNMENT OF ERROR 5 - 7. [11]

A. Standard of Review

[11] NOA items 8, 9, 12 -14 are combined in assignments 5 -7.

A trial judge's conclusions of law are reviewed for legal error. *Brin v. Stutzman*, 89 WnApp 809, 824, 951 P2d 291 (1998). Under Washington law, appraisal awards are conclusive and binding. *Bainter v. United Pac. Ins.* Co., 50 Wn. App. 242, 246, 748 P.2d 260 (1988)(appraisal awards are controlling on the issue of amount of loss). Whether a trial court has authority to deny enforcement of an appraisal award depends on whether there has been demonstrated fraud or misconduct during the appraisal. *Goldstein v. National Fire Ins. Co.*, 106 Wash. 346, 353, 180 P. 409 (1919). This issue is reviewed *de novo* for an error of law. *Id*.

B. The Trial Court Erred as a Matter of Law in Refusing to Respect the Appraisal Awards by Judge Bennett, and the Decision of Judge Veljacic Confirming the Appraisal Awards and the Damages They Set.

Under Washington law, appraisal provisions "are universally held to be valid and enforceable." *Goldstein v. National Fire Ins. Co*., 106 Wash. 346, 353, 180 P. 409 (1919), In *Keesling v. Western Firs Ins. Co. of Fort Scott, Kansas,* 10

Wn App 841, 847, 520 P2d 622 (1974), the court stated reasons why appraisal is a preferred manner of resolving valuation issues:

> "A provision in a fire insurance policy calling for the appraisal of the actual amount of fire loss in the event a demand for appraisal is made by either the insurer or the insured does not deprive the courts of the state of jurisdiction of an action against the insurer. **An appraisal provision provides a method for establishing the dollar value of damage sustained. Such a provision is justified in the expectation that it will provide a plain, inexpensive and speedy determination of the extent of the loss**. *Kavli v. Eagle Star Ins. Co.*, 206 Minn. 360, 288 N.W. 723 (1939). **However, the provision is not self-executing; and, if the company does not pay the damages fixed by the appraisers, an insured must commence legal action, the appraisal must be confirmed by the court and judgment entered for the insured**."

Id. at 845. (Emphasis added). In *Hyland v. Millers Nat. Ins. Co.*, 91 F.2d 735, 737 (9th Cir. 1937) the court explained the process this way:

> "The two appraisers appointed by the parties 'together shall estimate and appraise the loss or part of loss as to which there is disagreement, stating separately the sound value and the damage.' If these two fail to agree 'they shall submit their differences to the umpire.' The tribunal then becomes a three-party tribunal. There

> shall be an ‘award in writing.‘ **This award becomes effective when ‘duly verified‘ by any two of the three. The award ‘shall determine the amount or amounts of such loss**.” (Emphasis added).

In a similar holding, the Ninth Circuit held in *Portland Gen. Elec. Co. v. U.S. Bank Tr. Nat. Ass'n as Tr. for Tr. No. 1*, 218 F.3d 1085, 1090 (9th Cir. 2000) held that: “[C]ourts play a limited role in construing appraisal agreements, serving only to enforce the parties' bargain, not “to add gloss to the parties' own language.” In resolving insurance claims, courts should not interfere with an appraisal award unless it clearly appears that it was the result of bad faith, fraud, mistake or abuse of power. *See Couch on Insurance 2d* § 505:257; 44 *Am Jur. 2d Insur.* § 1692; *FDL Inc. v. Cincinnati Insur.*, 135 F.3d 503; *Lakewood Mfg Co. v Home*, 422 F.2d at 798; *Central Life Insur. v. Aetna Cas. & Sur.*, 466 N.W.2d at 260; *Munn v. National Fire Ins. Co.*, 237 Miss 641 (1959); *Providence Lloyds Insur. v. Crystal City Independent School District*, 877 S.W.2d 872, 875 (Tex. App. 1994).

As Judge Veljacic noted on May 8, 2020, First American

puts the appraisal clause in its policies. Judge Veljacic made important findings in that hearing, including that that these appraisal awards were **agreed to by Defendant** [12] and that there was **agreed coverage.** This comment about coverage was a reference to the fact that, in two years of litigation, Defendant never brought a coverage denial motion. On the contrary, it had paid parts of the claim.

Judge Veljacic was on firm ground in finding the Awards were agreed. Defendant's own appraiser signed off on them. Defendant simply refused to pay, despite agreeing to the amount of loss and despite Mr. May's admission to his appraiser, Roger Howson, that: "Appraisal decides how much First American owes to the Montlers." Ex. 264, p. 2.

C. The Court Erred as a Matter of Law in Conclusion of Law A1, by Refusing to Respect Judge Veljacic's Findings that First American Materially

[12] The Appraisal Awards were, in fact, unanimous and signed by both parties. Ex. 11.

Breached the Policy by Refusing to Submit to Appraisal and was Dilatory in Delaying Appraisal.

Judge Veljacic's finding in June 7, 2019 that First American was in material breach of contract for refusing to submit to appraisal was about as solid of a finding as you can get. The policy appraisal provision is mandatory. The appraisal provision obligates the insurer to name an appraiser within 20 days and for the two appraisers to confer. It is undisputed that First American refused to do that. Not only did Defendant delay appraisal many months but it filed an Opposition when Plaintiff moved to compel appraisal. This record overwhelmingly supports Judge Veljacic's findings on June 7, 2019. But Judge Veljacic not only made those findings in June 2019, he also made similar findings on May 8, 2020 when he confirmed the agreed appraisal awards.

The trial judge's contrary findings and conclusions -- that Defendant had not breached the appraisal clause and had not delayed appraisal -- are not supported by the trial court record. In fact, they were contrary to the actual evidence. The trial

judge was new to the case, but having presided over neither motion involving appraisal, the trial judge committed error by substituting her judgment for that of a more experienced judge that had actually reviewed the evidence and briefing and heard oral argument on those motions. The trial court's departure from Judge Veljacic's rulings constitutes prejudicial legal error.

Under Washington law, *Goldstein* and *Keesling supra*. the trial judge lacked the authority to undermine the work of the appraisal panel, and to negate the findings of a senior judge who had actually heard the evidence. Judge Veljacic's findings should have been respected and followed as the critical rulings in the case that they were.

The appraisal clause itself states that "the amount agreed upon will be the amount of loss." CP Ex 6, p. 17. The Appraisal Awards stated the amount of loss and the trial court ignored the fact that the appraisal awards in this case were unanimous. First American simply refused to pay Appraisal Awards in which it joined and agreed on the amount of loss.

First American's failure to pay is not only a breach of the policy Loss Payment and Appraisal clauses, but is also a breach of the duty of good faith and the fiduciary duty owed the policyholders. Defendant's refusal to pay is also a violation of RCW 48.30.015. WAC 284-30-330 prohibits the following conduct:

> (7) **Compelling a first party claimant to initiate or submit to litigation, arbitration, or appraisal to recover amounts due under an insurance policy** by offering substantially less than the amounts ultimately recovered in such actions or proceedings.
>
> * * *
>
> (17) **Delaying appraisals**. . . ."

Judge Veljacic's comment at oral argument on June 7, 2019 that Defendant was trying to benefit from its own dilatory conduct should not be overlooked here. We call this statute the "Insurance Fair Conduct Act" for a reason. Judge Veljacic's ruling was insightful:

> "I can't in good conscience let what appears to be dilatory behavior on the part of FA then benefit FA in terms of being able to cut off benefits to Ms. Montler. That would be unconscionable."

He found Defendant's conduct in trying to benefit from its own dilatoriness to be unconscionable, which is several clicks beyond unfair. The trial judge ignored this finding and, instead, found that First American was not even in breach of contract for refusing to submit to a mandatory appraisal process. And the trial judge's finding that the delay caused Plaintiff no damages, is indefensible. Plaintiff was denied the funds needed to restore her house to habitable condition for two years, during which she and her children were displaced from their home and denied the use of their furnishings, clothes and personal belongings that were contaminated by mold.

D. The Trial Judge's Conclusion of Law B4 and Supplemental Conclusions of Law 3 that First American Did not Seek to Delay Appraisal is not Supported by Substantial Evidence.

The record before Judge Veljacic showed that Ms. Montler had demanded appraisal almost a year prior to the June 7, 2019 hearing and that, in the intervening year, Defendant refused to submit to appraisal. Added to this is the glaring fact

that Defendant opposed Plaintiff's motion to compel appraisal and tried to cut off ALE benefits – for which Plaintiff had paid in her premiums.

Judge Veljacic's finding that the insurer had been "dilatory" in delaying appraisal was clearly supported by the record, as was his similar finding on May 8, 2020. By contrast, the trial judge's conclusion that First American did not delay appraisal was not supported by substantial evidence.

3. COMBINED ARGUMENT ON ASSIGNMENT OF ERROR 8 and 9.[13]

A. Standard of Review

A trial court's interpretation and application of a statute is a question of law reviewed *de novo*. *State v. Schultz,* 146 Wash.2d 540, 544, 48 P.3d 301 (2002).

B. The Trial Court Erred as a Matter of Law in Refusing to Award Mandatory Attorney Fees

[13] NOA items 17 and 18 are combined into assignments of error 8 and 9.

Under RCW 48.30.015(3).

RCW 48.30.015(3) provides that a trial court **shall award** attorney fees when a finding of an IFCA violation has occurred, as found by Judge Veljacic on June 7, 2019 and May 8, 2020. Judge Veljacic's findings that Defendant delayed appraisal, had been dilatory and was attempting to benefit from its own dilatory conduct satisfy this requirement.

RCW 48.30.015(5) provides:

> **(5) A violation of any of the following is a violation for the purposes of subsections (2) and (3) of this section:**
> **(a) WAC 284-30-330, captioned "specific unfair claims settlement practices defined"**

WAC 284-30-330 makes the following conduct a violation of the Fair Conduct Act:

> (7) **Compelling a first party claimant to initiate or submit to litigation, arbitration, or appraisal to recover amounts due under an insurance policy** by offering substantially less than the amounts ultimately recovered in such actions or proceedings.
>
> * * *
>
> (17) **Delaying appraisals**. . . ."

Judge Veljacic's finding that FA was being "dilatory" and had committed a "material breach" by delaying appraisal is essentially a finding that FA violated WAC 284-30-330(7) and (17).

Washington's Fair Conduct Act provides that, if the trial court finds that an insurer "acted unreasonably in denying a claim for coverage or payment of benefits," **or that it violated the above regulation**, the court **"shall"** award attorney fees to the policyholder. RCW 48.30.015(3) provides:

> (3) "**The superior court shall**, **after a finding of unreasonable denial of a claim for coverage or payment of benefits, or after a finding of a violation of a rule in subsection (5) of this section, award reasonable attorneys' fees and actual and statutory litigation costs,** including expert witness fees, to the first party claimant of an insurance contract who is the prevailing party in such an action. (Emphasis added).

The trial court disregarded the mandatory effect of the statute and Judge Veljacic's rulings. In order to avoid the duty to enforce RCW 48.30.015(2) and (3), the trial court made findings that were the exact opposite of the findings by Judge Veljacic, who had actually heard the evidence before ruling.

After trying to reverse Judge Veljacic's findings, the trial judge refused to enforce the Mold Appraisal Award, and denied further ALE benefits awarded by Judge Veljacic. The court then held that Plaintiff was not the prevailing party. But Plaintiff's Motion for Reconsideration pointed out that Ms. Montler had already been the prevailing party before trial even started by bringing the June 2019 motion and recovering additional living expenses before trial. Plaintiffs were clearly the prevailing party before trial even started.

The trial judge amended the judgment, but awarded no further damages and awarded only those attorney fees that were associated with the motion to extend ALE benefits. The court continued to deny Plaintiff attorney fees for the remainder of the case, under either the *Olympic Steamship* line of cases or RCW 48.30.015(3), even though Plaintiff prevailed in convincing Judge Veljacic to confirm the appraisal awards and rule that the damages were set before trial.

C. Plaintiffs are Entitled To Attorney Fees Under *Olympic Steamship v Centennial Ins. Co.*

In addition to an award of mandatory attorney fees under RCW 48.30.015(3), Plaintiffs are entitled to an award of attorney fees under *Olympic Steamship v Centennial Ins. Co*., 117 Wash2d 37, 53 811 P2d 673 (1991). In that case, the Washington Court of Appeals held that "an award of attorney fees **is required** in any legal action where the insurer compels the insured to assume the burden of legal action, to obtain the full benefit of his insurance contract, regardless of whether the insurer's duty to defend is at issue…." Stated differently, if a policyholder needs to sue the insurer in order to obtain benefits under the policy, the insurer must pay the policyholder's attorney fees. The *Olympic* court stated:

> "[W]e believe that an award of fees **is required** in any legal action where the insurer compels the insured to assume the burden of legal action, to obtain the full benefit of the insurance contract, regardless of whether the insurer's duty to defend is at issue…." (Emphasis added).

Olympic, supra at 53.

The *Olympic Steamship* holding was enforced in *Ellis Court Apartments, Ltd. V State Farm Fire and Casualty Co*., 117 Wash App 807, 72 P3d 1086 (2003). *Ellis* involved a coverage dispute where the court found that the policyholder's view of the issue was better reasoned than the insurer's view. The trial court granted relief for the policyholder and awarded reasonable attorney fees.

As noted above, after Plaintiff filed a Motion for Reconsideration, the trial court realized that its ruling on attorney fees was at least partially incorrect, and amended the Judgment in the case to award Plaintiff $ 18,771.00 in attorney fees associated with the successful Motion for Partial Summary Judgment extending ALE benefits in June 2019. But the trial judge still refused to award Plaintiff attorney fees for the remainder of the case. This was legal error.

VII. ARGUMENT IN RESPONSE TO APPELLANT'S APPEAL

A. Response to Appellant's Assignment of Error No. 1.

The trial court (Judge Veljacic) did not err on June 7, 2019 in finding (in the Motion to Compel Appraisal and extending ALE benefits) that First American materially breached the insurance policy by refusing to submit to appraisal and delaying appraisal. Likewise, Judge Veljacic did not err in finding on May 8, 2020 that Defendant had been dilatory throughout the case.

1. Standard of Review

A finding of material breach and that Defendant was dilatory in refusing to submit to and in delaying appraisal are factual findings reviewed to see if they are supported by substantial evidence. *State v. Halstien*, 122 Wash.2d 109, 128, 857 P.2d 270 (1993). Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. *Id*. *State v. Hill*, 123 Wash.2d 641, 644, 870 P.2d 313 (1994).

2. Argument

This assignment of error is rather disingenuous. There is really no serious dispute that Defendant committed a material breach of contract when it refused to submit to appraisal, in violation of its own appraisal clause, as Judge Veljacic found on June 7, 2019. After all, the insurer is the one that placed the appraisal clause in its policy. CP Ex 6, at p. 17. Likewise, there is no doubt that Judge Veljacic was absolutely correct when he stated in confirming both Appraisal Awards on May 8, 2020:

> **"There has been delay throughout this case on the part of First American – significant delay which, on a case where there's essentially admitted liability**, it's – I don't know that that's exactly precise, **but there's agreed coverage and a contractual provision regarding mandatory appraisal**, which is in First American's contract, which they drafted. **And a refusal to engage in that.** And so I am mindful of those issues, and I'm considering those. . . ." (Empasis added).

RP p. 77/Line 1 – p. 78/line 23.

Defendant's assignment of error is also disingenuous in saying there could be no finding of breach without a finding of monetary damage. In fact, the finding of breach was in refusing to obey its own contract and submit to appraisal. The appraisal

was supposed to set the damages and the Appraisal Awards did so. CP Ex 10.

Damages were firmly established for the case on May 8, 2020 when Judge Veljacic confirmed the Awards and the damages awarded in them. Judge Veljacic continued:

> "**Today, I don't think it's out of line for me to confirm those appraisal awards.** Those are filed September 12, 2019.**They're entitled "Agreed Appraisal of Loss."** They're performed by our umpire, retired judge – Superior Court Judge Roger Bennett, appointed by this Court. **They list the dwelling replacement cost value at – well, they speak for themselves. $128,742.70. And replacement of the contents, 68,232.17. And the permits and fees, $1,500. And so those are the values. I'm confirming that that's been completed – that those values are agreed**…. And so I believe I'm on firm ground in confirming that those are the values. **So that document speaks for itself. I'm confirming it today.** I'll entertain an order to that effect…. I've ordered it. It was done. I'm confirming that work." (Emphasis added).

RP p. 77/Line 1 – p. 78/line 23.

B. <u>Response to Appellant's Assignment of Error 2.</u>

The trial court did not err, upon reconsideration, in awarding Plaintiff attorney fees under the *Olympic Steamship* rule, after acknowledging that Plaintiff had prevailed on her motion to compel appraisal and motion for partial summary

judgment, prevailing on her request to extend ALE benefits. The trial court should have awarded additional fees, however, and seen that Plaintiff had also prevailed in confirming the Appraisal Awards.

1. Standard of Review

A trial court's decision that a Plaintiff is entitled to recover attorney fees is reviewed for legal error. *Brin v. Stutzman,* 89 WnApp 809, 824, 951 P2d 291 (1998).

2. Argument

After the trial judge denied Plaintiff's attorney fee petition, finding that (because of her rulings) Plaintiff was not the prevailing party, Plaintiffs moved for reconsideration. There, Plaintiff pointed out, *inter alia*, that she had prevailed at partial summary judgment in obtaining an extension of their ALE benefits after Judge Veljacic's June 7, 2019 ruling.[14]

---

[14] In fact, defense counsel started the trial complaining that Plaintiff had, in fact, recovered ALE in an amount approaching

Plaintiff showed that she was entitled to an award of attorney fees under *Olympic Steamship v Centennial Ins. Co*., 117 Wash2d 37, 53 811 P2d 673 (1991). In that case, the Washington Court of Appeals held that an award of attorney fees is required where the insurer compels the insured to file suit to enforce her rights under the insurance contract. The court stated:

> "[W]e believe that an award of fees **is required** in any legal action where the insurer compels the insured to assume the burden of legal action, to obtain the full benefit of the insurance contract, regardless of whether the insurer's duty to defend is at issue…." (Emphasis added).

Olympic, supra at 53.

Response to Appellant's Assignment of Error No. 3.

The trial court did not err in denying First American's fraud defense after trial.

$ 150,000. The trial judge overlooked that Plaintiff had recovered damages in six figures before trial even started.

1. Standard of Review

Factual findings of a trial judge in a bench trial are reviewed to see if they are supported by substantial evidence. *State v. Halstien*, 122 Wash.2d 109, 128, 857 P.2d 270 (1993). Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. *Id*. *State v. Hill*, 123 Wash.2d 641, 644, 870 P.2d 313 (1994).

2. Argument

First American sought to avoid paying the Appraisal Awards by any means necessary. It falsely accused Plaintiff and this attorney of fraud, hoping to escape paying a valid and confirmed Mold Appraisal Award by declaring a forfeiture of rights under the policy. Defendant based its defense on the flimsiest and most convoluted reasoning imaginable.

First, Defendant falsely asserted that Plaintiff here was trying to recover the same damages she had recovered in the Yang settlement. That assertion was blatantly and demonstrably

false. The Settlement Guardian Ad Litem, Mr. Rounds, had reported to the trial court in his SGAL report in the *Yang* case:

> " Unfortunately, a more extensive mold exposure occurred in the fall of 2017. **The present settlement does not include any injuries or expenses arising from the 2017 mold exposure**."

Id. (Emphasis added). CP Ex 15, p. 4,/lines 15 – 17.

Defendant distorted Plaintiff's demand letter in the *Yang* case. To be sure, the demand letter itself explained the demand for mainly non-economic damages arising from the Yang's 2015 nondisclosure as follows:

> "Liam Holbrook was hit the hardest by the mold contamination, no doubt he was the most susceptible. He **experienced classic mold symptoms and asthma aggravation stemming from the exposure in 2015**. This is a serious condition. I have had a dear friend die from an asthma attack. I am having Marianne obtain a urinalysis for mycotoxin exposure for Liam, and if that comes back as positive we will have to re-evaluate our damages position. **Ochratoxin A and Aflatoxin B are known carcinogens. Tricothecenes can be even worse. Based on Liam's difficulties, I suspect he has mycotoxins in his system.** A child should not have to deal with that kind of environmental insult."
>
> "**Marianne Montler suffered classic health devastation as well.** Even her prior health problems were severely aggravated by the exposure. I value her non-economic damages claim at $ 150,000. I have received a verdict for a mother in that amount. **Marianne was hit harder than that woman was and demonstrates symptoms that also make me suspect mycotoxicosis**.

> Maddy, the daughter, had less severe symptomology and is fortunate in that regard. She also has had many bad dreams about her toxic home and is very much impacted psychologically. **This proposal acknowledges the different levels of illness among my clients**.

CP Ex. 172. The propose the Yang personal injury settlement as follows:

> "Defendants will pay $ 75,000 for Liam Holbrook and $ 10,000 for Madeleine Holbrook, to be placed in trust until they reach 18 years of age. Marianne is willing to resolve her **illness claims** without non-economic damages but will require $ 75,000 to compensate her for **past and future medical expenses** for her and her children, and costs for consultants and various other expenses. In addition, the Yangs will pay an additional $ 25,000 for my attorney fees, which are recoverable under the statutes and earnest money agreement."
>
> $ 75,000 Liam
> $ 10,000 Maddy
> $ 75,000 Marianne
> $ 25,000 Costs and fees
> ---
> $ 185,000

The evidence at trial showed that the settlement in the *Yang* case resulted not from Plaintiff's demand letter, but from a counteroffer by the Yang's attorney, Mr. Steven Turner. In an email a few months after Plaintiff's demand letter – which Turner ignored -- Mr. Turner wrote:

> "Before we launch into depositions and other full blown discovery, my clients have authorized me to make one final settlement offer of $ 120,000.00, to

> be allocated between the plaintiffs and your fees in whatever manner you see fit. **I urge your clients to accept this offer because the defendants in the other lawsuit are going to move to consolidate the two actions. There could be several advantages to settling this suit before the two suits are consolidated**." (Emphasis added) [15]

Plaintiffs accepted Mr. Turner's counteroffer. The Yangs paid no money for the property damage from the October 17, 2017 toilet overflow.

Defendant's claim that this attorney somehow committed fraud by not disclosing the settlement demand to Mr. Turner in the *Yang* case distorted that settlement demand.

Contrary to the false narrative conflated in Defendant's motion for leave to file an amended Answer to include a fraud defense, Defendant was informed – once by Mr. Rounds'

---

[15] CP Ex 20. At trial Mr. Turner's dubious testimony was that he was not at all concerned about consolidation. Apparently, he was so unconcerned that he only mentioned consolidation twice in a three sentence email.

SGAL Report referenced above and once by this attorney on page 1 of the Response to Defendant's Request for Production--that the Yang settlement was unrelated to any damages stemming from the October 2017 toilet overflow.

Plaintiff's Motion in Limine is in the Appellant's Designation of Record. Exhibit 5 referenced in that Motion in Limine was a copy of Plaintiffs' June 23, 2019 Response to Defendant's Request for Production In that response, Plaintiffs state, in their very first statement on page 1:

> "Plaintiffs do not seek any damages in this case **that arose prior to the events in October 2017.**"

CP Motion in Limine dtd 7/30/2021. (Emphasis added).

As shown by the response to Request for Production number 9, defense counsel was provided a copy of Mr. Rounds' SGAL report in the Yang settlement. Mr. May had subpoenaed Mr. Turner's settlement file in this case, so Plaintiff did not send a duplicate copy. The point is that, contrary to the false narrative Defendant used to manufacture a supposed fraud

defense counsel was informed – once by Mr. Rounds' SGAL Report and once by Plaintiff's counsel that the Yang settlement was unrelated to any damages stemming from the October 2017 water event. [16]

In an effort to be quite candid with Mr. Turner, Plaintiff's counsel informed him about the property damage from the October 17, 2017 toilet overflow and that there was an insurance claim seeking that damage from First American. Counsel tried to make it clear that while Plaintiffs were not seeking the 2017 damage from the Yangs, there was a risk that the insurer may come after the Yangs, seeking subrogation if it paid the property damage claim. Counsel had written to Turner in the demand letter:

---

[16] Defendant tried to base its fraud defense on a failure to produce the settlement demand letter to Defendant in response to a Request for Production. The letter itself was inadmissible and had no relevance to this property damage case.

> "For the purpose of this offer only, my clients will seek repair costs and contents reimbursement **from their insurer**, but this is no guarantee that the insurer will not seek to **pursue subrogation rights against the Yangs**, once it pays off. The Yangs assume that risk.
> CP Ex 20 (Emphasis added).

Defendant pointed to a Rule 408 settlement demand letter to Mr. Steven Fuller in the *Yang* case in **September 2018,** seeking noneconomic damages for mold related illness arising

The case against the Yang's was a personal injury case involving nondisclosure of defects in the house when the Yangs sold it to Ms. Montler in mid 2015. But **this case** is about a flood originating in the upstairs bathroom on **October 17, 2017**. Defendant presented no evidence of fraud at trial. In fact, Ms. Montler made no affirmative representations, fraudulent or otherwise, to First American. She simply reported the water damage and relied on the insurer to honor its policy.

Fraud has a number of elements, none of which are present here. In order to maintain a claim for fraud, a party must prove, by clear and convincing evidence the following

elements: (1) a representation of an existing fact to the alleged victim of the fraud; (2) that the statement is material; (3) that the statement is false; (4) the speaker knew the statement was false or was ignorant of its truth; (5) the speaker intended the recipient to act on the statement; (6) the recipient did not know the statement was false; (7) the recipient relied on the truth of the statement; (8) the recipient had a right to rely on it; and (9) the recipient suffered damages. See e.g. *Baertschi v. Jordan*, 68 Wash.2d 478, 482, 413 P.2d 657 (1966). None of these elements are present here. The proponent of the alleged fraud must show every element by clear, cogent, and convincing evidence. *Id.* at 483, 413 P.2d 657.

Defendant is trying to create a forfeiture defense out of whole cloth. Defendant simply failed to present evidence of fraud at trial. All that Defendant succeeded in doing was to point to statements made to a different party in a different case involving settlement of a different claim. Defendant heard no statement, so it did not rely on any statement. Even if we ignore

those two fatal defects to the fraud defense, at trial Defendant proved no prejudice arising out of the Yang settlement and no damages. Defendant did nothing differently than it had done before it learned of the Yang settlement. It had denied payment and continued to do so, despite its appraisal clause and its Loss Payment clause and case law requiring it to pay the award. *Keesling, supra*.

Fraud is a specific intent tort. It is not a fraud by concealment to have assumed that Mr. Turner disclosed Plaintiff's settlement letter to the Yangs when he responded to Defendant's subpoena. Plaintiff didn't oppose or object to that subpoena and the evidence below was that the Yang settlement was based on Mr. Turner's offer and not Plaintiff's demand letter. Therefore, the demand letter was not really relevant evidence.

C. <u>Response to Appellant's Assignment of Error No.</u>

The trial court did not err in denying First American's motion for attorney fees as a CR 11 sanction. The trial court

had found no CR 11 violation by Plaintiff's counsel.

1. Standard of Review

Factual findings of a trial judge in a bench trial are reviewed to see if they are supported by substantial evidence. *State v. Halstien*, 122 Wash.2d 109, 128, 857 P.2d 270 (1993). Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. *Id*. *State v. Hill*, 123 Wash.2d 641, 644, 870 P.2d 313 (1994).

2. Argument

Defendant moved to disqualify Plaintiff's counsel on the eve of trial, based on a false accusation that this attorney had communicated with Defendant behind Mr. May's back. Defendant then accused Plaintiff's counsel of violating CR 11 in responding to the Motion to Disqualify him. [17]

---

[17] This would have left Plaintiff without legal counsel just a couple of weeks before trial.

In this lawyer's view, defense counsel's motion for sanctions placed his own credibility and motives in question, and making defense counsel's own series of misrepresentations fair game. For example, Plaintiff's counsel responded to the accusation in Mr. May's affidavit in support of the Motion to Disqualify that Plaintiff's counsel had contacted First American behind Mr. May's back by showing what had actually happened. The actual evidence: communications between counsel at the time of the discovery of the new claim, showed that this attorney tried to report the new claim to Mr. May in February 2021. See CP Exhibits filed with Plaintiff's March 1, 2021 Response to Motion to Disqualify. Mr. May curtly refused to acknowledge the claim, saying he wasn't involved. May asked Plaintiff's attorney to report the new claim directly to First American. [18]

---

[18] Ironically, Plaintiff's counsel had reported the new claim through Mr. May precisely to avoid being accused of

There were other examples of things defense counsel did to hurt his own credibility, like file a Notice of Unavailability saying he was in trial in King County the first week of March, 2020 to avoid a hearing set by Plaintiff in this case. Plaintiff's counsel searched the King County website for Mr. May's name to see what court he was in. The King County Superior Court website said that Mr. May wasn't on any King County trial docket that week. Defense counsel certainly did not help his own failing credibility by emailing a proposed draft of a motion to strike that he threatened to bring on shortened time in Clark County on the March 6 – the very day that he had previously claimed to be unavailable and in Seattle.

Defendant had no basis for an attorney fee award, but it sought attorney fees in excess of $ 193,000 on its motion for attorney fees as a sanction for this attorney's supposed CR 11

---

communicating with the insurer directly. It didn't matter.

violation. The trial court found no CR 11 violation by Plaintiff's counsel, stating:

> "With respect to Defendant's Motion for Attorney Fees under CR 11, the court did not find that Plaintiff's attorney violated CR 11."

CP Order dtd 11/12/2021. If anything, Defendant's motion for sanctions, like its motion to disqualify Plaintiff's counsel, was, itself, based on a false narrative. The trial judge could easily have sanctioned Defendant for submitting accusations against Plaintiff's attorney that were demonstrably false.

VIII. REQUEST FOR REASONABLE ATTORNEY FEES

RAP 18.1 authorizes a request for attorney fees on review. Plaintiff submits that the rationale of *Olympic Steamship* applies to appellate work as much as it does to the action below. Plaintiff has incurred further attorney fees on appeal for having to respond to First American's Appeal and for having to seek review of the trial court's decision below by cross appeal. Accordingly, Plaintiff requests that the Court of

Appeals decide the amount of attorney fees to award in connection with the dueling appeals, and direct the trial court on remand to award Plaintiff the fees requested below.

IX. CONCLUSION

Marianne Montler respectfully requests that this court reverse the trial court decision with instructions to enter judgment enforcing the Mold Appraisal Award in her favor, with interest, as well as a direction to grant the attorney fees and costs requested by Plaintiff below. Plaintiff also requests an award of her attorney fees and costs on appeal from this court.

Dated this 24th day of August 2022.

/s Kelly Vance
Calvin P. "Kelly" Vance, WSB 29520
Counsel for Plaintiffs

RAP 18.17 CERTIFICATION WORD COUNT AND TYPE SIZE REQUIREMENTS

I certify that this brief, which combines briefing on two separate appeals, contains 15,191 words, exclusive of cover, tables and certificates, and that a motion for leave to file an overlength brief is being filed contemporaneously with this brief. I further certify that this brief contains type not smaller than 14 points for both the text and footnotes.

/s Kelly Vance
Calvin P. "Kelly" Vance
WSB #29520
Attorney for Ms. Montler

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing on the following attorneys of record this 23rd day of August 2022 by US Mail to the following defense counsel:

Rob S. May
Rmay@kilmerlaw.com
2701 NW Vaughn Street, Suite 780
Portland, OR 97210
Attorney for Defendant

/s Kelly Vance
Calvin P. "Kelly" Vance, WSB #29520
Attorney for Ms. Montler

VANCE LAW OFFICE

August 23, 2022 - 1:33 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	56276-6
Appellate Court Case Title:	Marianne Montler, Resp/Cross-App v. Belfor USA Group, Inc., et al, App/Cross-Resp
Superior Court Case Number:	18-2-05942-2

The following documents have been uploaded:

- 562766_Briefs_20220823133305D2318446_6306.pdf
  This File Contains:
  Briefs - Respondents/Cross Appellants
  The Original File Name was MONTLER Corrected BRIEF OF RESPONDENT CROSS APPELLANT 8-24-2022.pdf

A copy of the uploaded files will be sent to:

- HPettit@kilmerlaw.com
- chicks@kilmerlaw.com
- rmay@kilmerlaw.com

Comments:

Sender Name: Calvin Vance - Email: moldlawyer@aol.com
Address:
1066 S BREEZY WAY
POST FALLS, ID, 83854-7445
Phone: 208-262-8115

Note: The Filing Id is 20220823133305D2318446